U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 16 May 2005

CASE NO.: 2005-SOX-41

IN THE MATTER OF:

MICHAEL J. DAWKINS,
Complainant

v.

SHELL CHEMICAL, LP,
Respondent

ORDER GRANTING SUMMARY DECISION AND DISMISSING CLAIM

This case arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A (West Supp. 2003)(herein "the Act"). Complainant filed a written complaint with the undersigned on April 4, 2005. Respondent replied on April 13, 2005, requesting dismissal of the complaint, denial of the request for hearing, and all relief sought by Complainant on various grounds. On April 22, 2005, Complainant was ordered to show cause by May 9, 2005, why Respondent's motion for summary decision should not be granted. He did not respond to said order.

The Administrative Procedure Act ("APA") states the rules of practice and procedure for administrative hearings before Department of Labor, Office of Administrative Law Judges. 20 C.F.R. § 18.1 (2003). The APA states:

> (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

20 C.F.R. § 18.40(d); *see also* Rule 56 of the Fed. Rules of Civil Pro.

An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. *Matsushita Elec.*

Inds. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Furthermore, the fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. *Id.* If the court finds a fact or facts to be material, then it must determine whether there is a "genuine issue" concerning any of them. 10 A. Wright and Miller, *Federal Practice and Procedure,* § 2725 at 95 (1983). If no such issues are present, the moving party is entitled to judgment as a matter of law. If the slightest doubt remains as to the facts, the motion must be denied.

Timeliness

Respondent first objects that Complainant failed to timely request a hearing before the Office of Administrative Law Judges. The regulations applicable to complaints alleging discrimination under Sarbanes-Oxley provide, in pertinent part:

> (2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.
>
> (b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

29 C.F.R. § 1980.105(a)(2), (b). The regulations further state:

> (a) Any party who desires review, including judicial review, of the findings and preliminary order . . . must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to Sec. 1980.105(b). The objection . . . and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorneys' fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

29 C.F.R. § 1980.106(a).

Complainant filed his complaint with the Department of Labor in an email dated October 21, 2004. Following an OSHA investigation, the Secretary's findings were originally issued on November 23, 2004. Respondent and the Department of Labor's Office of Administrative Law Judges received a copy of the Secretary's findings in late November, 2004; however, there is no evidence to establish Complainant received a copy of the findings at that time. To the contrary, his December 29, 2004 e-mail to OSHA indicated he had not received a copy of the findings. While the record contains copies of the letters OSHA mailed to Respondent and the OALJ dated November 23, 2004, there is no copy of the letter sent to Complainant on that date and there is no return receipt in evidence to prove Complainant received the letter at that time. This lack of evidence, combined with Complainant's December e-mail, raises sufficient factual doubts to preclude an order of summary decision on the issue of timeliness. When the evidence is viewed in the light most favorable to the Complainant, it establishes that he first received the findings on February 25, 2005. Complainant filed his request for hearing on March 15, 2005, well within the 30-day limit set forth in the regulations, *supra*. Therefore, his request would be timely. For these reasons, Respondent's request to dismiss the claim as untimely is **DENIED**.

Covered Employer

Respondent next contends the complaint should be dismissed on the grounds that Shell Chemical, LP, is not a publicly-traded company and is not a covered employer subject to the Act. Indeed, the whistleblower provisions of the Act, codified in § 1514A, apply to two specific classes of publicly traded companies.

> (a) Whistleblower protection for employees of publicly traded companies. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain securities statutes, rules, and regulations] relating to fraud against shareholders . . . or
> >
> > (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to an alleged violation of [certain securities statutes, rules and regulations] relating to fraud against shareholders.

18 U.S.C. § 1514A (emphasis added). *See also Flake v. New World Pasta*, ARB No. 03-126, 2003-SOX-18 (Feb. 25, 2004).

The Secretary found Respondent to be a covered employer with a class of securities registered under § 12 of the Securities Exchange Act, but offered no explanation or support for this finding. Contrary to this finding, Respondent submitted a signed affidavit of its corporate secretary attesting to the fact it is a Delaware limited partnership, owned by SCOGI, L.P. and Shell Oil Company, and not publicly traded or otherwise subject to the provisions of the Act. Shell Oil Company is in turn owned by Shell Petroleum Inc., which is owned by Shell Petroleum N.V., which is indirectly owned by Royal Dutch Petroleum Company N.V. and the "Shell" Transport and Trading Company, PLC. (*See* Respondent's Exh. 5). As Shell Chemical, LP, is not publicly traded nor is required to file reports under Section 15(d) of the Securities Exchange Act, it cannot be said to meet the requirements of § 1514A(a) and this clam is not properly maintained against it.

In analyzing the evidence in the light most favorable to the Complainant, it should be noted that the whistleblower protections found in the Act have been held to apply to employees of a non-public subsidiary of a publicly traded company. *Morefield v. Exelon Services, Inc., et al*, 2004-SOX-2 (ALJ January 28, 2004). To successfully pursue the employer's parent company, however, a complainant must follow the regulatory procedures and name the parent company in the original complaint and allege facts to show sufficient commonality of management and purpose between the subsidiary/employer and its parent to justify piercing the corporate veil and holding the parent company liable for its subsidiary's actions. *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ March 5, 2003) *citing U.S. v. Bestfoods, et al.,* 524 U.S. 51, 61 (1998)(mere fact of a parent-subsidiary relationship does not make one company liable for the torts of its affiliate); *Klopfenstein v. PCC Flow Technologies Holdings, Inc.* 2004-SOX-11 (ALJ July 6, 2004)(the Act does not provide coverage for non-public subsidiaries standing alone). Additionally, 29 C.F.R. § 18.5(e) provides that a complaint may only be amended after it is answered only if the ALJ determines the amendment to be within the scope of the original complaint and is consistent with due process considerations. *Ewald v. Commonwealth of Virginia,* ARB No. 02-027, 89-SDW-0001, slip op. 6 (Dec. 19, 2003). The complainant in *Powers* initially filed her whistleblower claim against her employer, which was not a publicly traded company. She attempted to cure this defect by unilaterally adding the publicly traded parent company of her employer to the caption of the case. The ALJ dismissed the case, finding that the complainant failed to allege evidence sufficient to pierce the corporate veil and concluding that any claim against the parent company was improperly before her as it had not been investigated by OSHA, was untimely, and was not the complainant's employer. *Powers*, 2003-AIR-12 slip op. at 4-5.

Complainant brought the current action against Shell Chemical, Inc., alone, which is not a publicly traded company. He did not name as a respondent Shell Oil or any other parent company of Respondent which may be publicly traded, and he did not move to amend his complaint; even if he had, these parent companies would be entitled to participate in an OSHA investigation before properly being before the undersigned. Further, there is no indication that the parent companies were sufficiently involved in the management and employment relations of Respondent to justify a piercing of the corporate veil in this matter. Indeed, when the evidence is

viewed in the light most favorable to the Complainant, there remains no factual dispute that Respondent is not a covered employer subject to the Act. Based on the foregoing discussion, Respondent's motion for summary decision is **GRANTED** and the claim is hereby **DISMISSED.**

Protected Activity

Respondent also alleged the claim should be dismissed because Complainant's actions took place on foreign soil outside the purview of the Act and that his actions did not constitute protected activity under the Act. Given that Respondent offered only generalized arguments and absent any controlling authority for its position, I hesitate to find there is no genuine issue of material fact with respect to Complainant's alleged protected activity. However, since the claim shall be properly dismissed for the lack of a covered respondent subject to the Act, these issues need not be addressed.

IV. ORDER

Employer Shell Chemical's Motion for Summary Decision is hereby **GRANTED**, on the basis that it is not a covered employer subject to the Act, and the claim shall be **DISMISSED**.

A

CLEMENT J. KENNINGTON
ADMIISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).